RE CHEN SING CHEW; *EX-PARTE:* ORIENTAL TIN SMELTERS SDN. BHD.

[O.C.J. (Wan Hamzah J.) May 10, 1974]
[Ipoh — Bankruptcy No. 139 of 1972 — Ex-parte]

Bankruptcy — Proceedings — Earlier orders permitting instalments — Whether invalidating bankruptcy proceedings — Lack of authority to commence proceedings.

The creditors obtained judgment against the debtor in the Sessions Court whereby the debtor was ordered to pay the judgment debt and costs by monthly instalments. The debtor failed to comply with this order. The judgment-creditors thereupon took out a judgment-debtor summons and a consent order was made on 4.2.72 that the judgment debt was to be paid by instalments with effect from 16.2.72 and in default of any one instalment the balance was to become due and payable forthwith. The judgment-debtor defaulted and on 5.7.72 the judgment-creditor commenced the present bankruptcy proceedings. The judgment-debtor challenged the proceedings *inter alia* on the following grounds: (a) the bankruptcy proceedings were rendered invalid, by the previous orders for payment of the judgment debt by instalments and (b) the bankruptcy proceedings were bad for lack of authority on behalf of one N. Takai a director of the judgment-creditors who had signed the bankruptcy petition and dated it on 27.10.72. Written authority was in fact given to N. Takai on 1.3.73. An affidavit certifying the truth of the statements in the petition was dated 23.10.73 i.e. earlier than the date of the statements.

Held: the earlier orders directing payment by instalments did not invalidate the bankruptcy proceedings but the lack of authority to commence the bankruptcy proceedings rendered them a nullity.

BANKRUPTCY.

Bachan Singh for the judgment-creditors.

J. R. Devadas for the judgment-debtor.

Wan Hamzah J.: The Oriental Tin Smelters Sdn. Bhd., judgment-creditors, have purportedly petitioned to the court that a receiving order be made in respect of the estate of Chen Sing Chew, judgment-debtor. In his affidavit dated 30 March 1973 the judgment-debtor objects to the petition on a number of grounds.

In that affidavit the judgment-debtor states, *inter alia*: "the said petition is founded on an Order of the court made herein on 8 January 1971 in Ipoh Sessions Court Civil Action No. K 26 of 1970. This Order, however, was superseded by a subsequent Order of the court made on 4 February 1972. The said petition is therefore bad and is a nullity..." From this statement and from the arguments by counsel for the judgment-debtor I understand that the judgment-debtor meant to refer to the orders made by the President of the Sessions Court allowing him to pay the judgment-debt by monthly instalments. As I understand it, it is alleged by the judgment-debtor that the order for payment by instalments was still effective and in force at the time of the commencement of the bankruptcy proceedings and therefore these proceedings are bad in law.

From the records in Ipoh Sessions Court Civil Action No. K 26 of 1970 the position appears to be as follows. When the creditors obtained judgment on 8 January 1971 in the Sessions Court, the court ordered the judgment-debtor to pay the judgment-debt of $7,700, costs and interest by monthly instalments of $500, the first instalment to be paid on or before 1 February 1971 and subsequent instalments to be paid on the first of succeeding month and the court also ordered that in default of payment of any one instalment or part thereof on the due date, the entire balance of the judgment-debt then remaining unpaid shall be deemed to have immediately become due and payable and the creditors shall be at liberty to levy execution for the whole of such balance. According to evidence the judgment-debtor did not comply with the order for payment by instalments and no payment at all was made, vide paragraph 3 of the affidavit of Bachan Singh dated 18 April 1973, enclosure 18, which evidence is not challenged by the judgment-debtor.

As the result of judgment-debtor summons taken out by the creditors, the Sessions Court on 4 February 1972 made a consent order as follows: —

"Judgment-debtor to pay $500 per month with effect from 10.2.1972. In default of any one instalment balance to become due and payable forthwith."

There is evidence to the effect that after this order of 4 February 1972 judgment-debtor paid three instalments only amounting to $1,500 and since April 1972 he has failed and neglected to pay any sum, vide paragraph 12 of that affidavit, which evidence is not challenged by the judgment-debtor. On 5 July 1972 the creditors' solicitors filed in this court a request for the issue of a bankruptcy notice and commenced these bankruptcy proceedings against the judgment-debtor. Therefore I find that at the commencement of these bankruptcy proceedings, there was the balance of the judgment-debt remaining unpaid, and the whole of it was due and payable then, and the sum was no more payable by instalments. I hold that the bankruptcy proceedings have not been rendered invalid by the orders for payment of the judgment-debt by instalments.

In his affidavit the judgment-debtor disputes the amount of $7,199.90 claimed by the creditors in their petition, on the ground that a sum of $120 is due from the creditors to him on 26 February 73 in connection with the hearing of that petition. Counsel for the creditors stated that the creditors agree the amount claimed in the petition be reduced by an amount equivalent to the cost awarded.

In his affidavit the judgment-debtor raises objection in connection with interest. He disputes liability to pay interest and also disputes the amount of interest as computed and claimed by the creditors. However, he and his counsel did not elaborate or explain how he is absolved from liability to pay interest or in what way the interest has been wrongly computed. It is clear from the judgment that he was ordered to pay interest, and computation of the interest in the petition seems to be correct. Therefore I dismiss his objection on this matter.

In his affidavit the judgment-debtor raises further objection to the proceedings on the ground that he has brought claims against certain persons in two civil actions in the High Court, and contends that if he is adjudged bankrupt this would cause prejudice and hardship to him in the prosecution of his claims in these civil suits. Obviously this ground of objection is not tenable.

The judgment-debtor in his affidavit raises objection to the proceedings on yet another ground. It is contended that the bankruptcy proceedings are bad due to lack of authority for Mr. N. Takai to institute the proceedings on behalf of the Oriental Tin Smelters Sdn. Bhd. The petition for bankruptcy was signed by Mr. N. Takai, a director of the judgment-creditors, and dated 27th October, 1972. When the validity of the proceedings was challenged an affidavit affirmed by Mr. N. Takai was filed in which he stated that he had been duly authorised by the judgment-creditors to act on their behalf in all matters in connection with the bankruptcy proceedings against the judgment-debtor. A written authority was attached to the affidavit bearing the seal of the company but it was not dated. When Mr. N. Takai was cross-examined, he disclosed that the authority was given to him on 1st March, 1973. It is clear that when he signed the petition on 27th October, 1972 he had no such authority. I also find another irregularity in this case. The affidavit certifying the truth of the statements in the petition bears the date 23rd October 1972, *i.e.* earlier than the date of the statements.

Therefore I hold that the bankruptcy proceedings were a nullity. The petition is dismissed with costs.

Petition dismissed.

Solicitors: *Arulanandom & Co.; J. R. Devadas.*

TAY SAY GEOK & ANOR. v. TAY EK SENG CO. SDN. BHD.

[F.C. (Suffian L.P., Ali F.J. and Mohamed Azmi J.) May 13, 1974]

[Johore Bahru — Federal Court Civil Appeal No. 78 of 1973]

Companies — Meeting — Power of court to order meeting to be called — Whether applicable to a meeting of Directors — Companies Act, 1965, s. 150.

The point that arose in this appeal was whether section 150 of the Companies Act, 1965, which gives the court power in certain circumstances to order a meeting to be called and conducted in such manner as the court thinks fit, is applicable to a meeting of the Board of Directors.

Held: section 150 of the Companies Act, 1965, is concerned only with a meeting of the company and is not applicable to a meeting of the Board of Directors.

FEDERAL COURT.

Lim Kean Chye (*Anthony Taye* with him) for the appellants.

Thara Singh Sidhu for the respondents.

Ali F.J.: The short point in this appeal turns on the construction of section 150 of the Companies Act, 1965 which provides as follows —

"150. If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles or this Act the court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called held and conducted in such manner as the court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting."

The question in dispute is whether "meeting" in this section includes a meeting of the Board of Directors. Pawan Ahmad J. who heard this case answered it in the negative and I respectfully agree with him.

The appellants as Directors applied by Originating Summons for an order under this section to convene a meeting of the Board of Directors. The reason for the application was that a meeting of the Board could not be held as there were only 3 Directors and one of them, Tay Seck Huan, having been absent or refused to attend meetings, there was no quorum of 3 as required by Article 109 of the Company's Articles of Association. As we are only concerned with the meaning and effect of section 150 of the Companies Act, 1965 I do not find it necessary to consider the reason given. Section 150 appearing as it does in Division 3 of Part V of the Act undoubtedly is concerned only with a meeting of the Company. Quite apart from that the section clearly permits a member, who in terms of section 16(6) of the Act must be a member of the Company, to apply for an order to call a meeting which can only be a meeting of the Company. A meeting of the Board of Directors is provided for in paragraph 79 of Table A of the 4th Schedule to the Act which is somewhat similar to Article 109 of the Company's Articles of Association.

As for the reason of the application, I need only observe that a quorum of 3 as required by Article 109 would be impossible to obtain if the number of Directors is at its minimum of 2 as is provided in Article 84.

The appeal is, therefore, dismissed with costs to be borne by the appellants personally. Deposit to respondents on account of taxed costs.

Suffian L.P. and **Mohamed Azmi J.** concurred.

Appeal dismissed.

Solicitors: *Mah-Kok & Taye; Sault & Co.*